

jar/jms

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

STEVEN G. TRAPP,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 03-3335-JAR
)	
UNITED STATES MARSHALS SERVICE,)	
DAVID DILBERTI,)	
TROY SCHUSTER,)	
DARREN S. WEBER,)	
JOHN DOES (3) USMS TASK FORCE)	
OFFICERS, and)	
CRAIG BEAM,)	
Defendants.)	
)	

MEMORANDUM ORDER AND OPINION GRANTING MOTION TO DISMISS

This matter comes before the Court on defendants’ Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Doc. 15). Because these defendants are undisputably sued in their official capacities for actions they took as federal law enforcement officers, they are protected by sovereign immunity and the case is dismissed pursuant to Fed. R. Civ. P. 12(b)(1).¹

Plaintiff filed this action, *pro se*, seeking \$1.5 million in actual damages and an unspecified amount of compensatory and punitive damages for “Intentional infliction of Physical & Emotional Duress” alleging that Defendants “Conspired and Violated” his Fourth and Fifth

¹The Court need not address the defendants’ alternative grounds for summary judgment: qualified immunity and quasi-judicial immunity. On his form complaint, for each defendant, plaintiff checked the box signifying that the defendant was being sued in his official capacity. And, in his narrative description of his claims, plaintiff repeatedly refers to the defendants by their title as deputy marshals or task force officers, and describes conduct that can only be characterized as law enforcement activity.

Amendment rights in the course of arresting him on August 13, 2002.

The Court twice granted plaintiff's requests for an extension of time to respond to this motion to dismiss. The Court granted a 60-day extension to June 2, 2004; and another extension to July 26, 2004. Plaintiff's response, although dated July 26, 2004, was not filed until July 29, 2004. Nevertheless, the Court has considered plaintiff's response.

Factual Background

While Defendants offer much more detail of the events culminating in the arrest of Plaintiff on August 13, 2002, that is understandable, as Plaintiff was not privy to conversations among the defendants and others preceding his arrest. Although Plaintiff claims that defendants arrested him without having an arrest or search warrant, this is not material issue of fact. It is clear that defendants had no search warrant. From their factual assertions, it appears that defendants did not have an arrest warrant in hand, when they arrested plaintiff in the District of Kansas. However, defendants had been instructed to arrest plaintiff, and were aware that a complaint and arrest warrant were being contemporaneously obtained in the District of Nevada at the time they were in the process of arresting plaintiff.

More specifically, the undisputed facts are as follows. Plaintiff was convicted and sentenced in the District of Nevada. He was instructed to self-surrender to the Bureau of Prisons (BOP) facility in Leavenworth, Kansas on August 8, 2002. Plaintiff failed to self-surrender. On the following day, August 9, 2002, the BOP advised the United States Marshals Service (USMS) in the District of Nevada of plaintiff's failure to surrender. The USMS in Nevada contacted their counterparts in Kansas, where plaintiff resided. The USMS in the District of Kansas then undertook to find plaintiff. Plaintiff's Complaint states that the named defendants were Deputy

United States Marshals and the three unnamed defendants were United States Marshals Service Task Force Officers. The Complaint further states that each defendant was acting in his official capacity, as an employee of the United States, at the time plaintiff's claims arose.

On August 13, 2002, Defendant Dilberti, a deputy marshal for the USMS in Nevada, telephoned plaintiff's father and requested that he have plaintiff contact Dilberti. Almost immediately, plaintiff telephoned Dilberti, explaining that he was hiring a new lawyer and would be filing for a new court date. Dilberti informed plaintiff that he was subject to arrest, for his name had been entered in the National Crime Information Center as a wanted felon. Dilberti advised plaintiff to call the sentencing judge in the District of Nevada in order to resolve any issue about self-surrender. Plaintiff confirmed for Dilberti, plaintiff's telephone number and address in Topeka, Kansas.

Dilberti then called Judge Pro, the sentencing judge in Nevada, and learned that plaintiff had called the judge's office. But, Judge Pro advised Dilberti that Judge Pro was not going to grant plaintiff *another* extension of time to self-surrender. Judge Pro verbally instructed Dilberti to arrest plaintiff; and Judge Pro informed Dilberti that an arrest warrant would be issued that day. Dilberti then spoke with an Assistant United States Attorney in Nevada, who assured Dilberti that he would immediately file for a federal arrest warrant. This prosecutor also advised Dilberti that he could arrest plaintiff on the basis of the Judgment and Commitment Order previously filed with the court.

Dilberti then telephoned Defendant Beam, a USMS deputy marshal in Kansas, who leads a task force that searches for fugitives. Dilberti advised Beam that he had spoken with plaintiff, that plaintiff was located in Kansas and had failed to surrender to serve his sentence; that the

sentencing judge had ordered that he be arrested; and that the judge would be signing an arrest warrant that very day, August 13, 2002. In fact, after this phone call, Dilberti was the affiant on Complaint filed in the United States District Court in Nevada, alleging that plaintiff was in violation of 18 U.S.C. § 3146(a)(2), Failure to Surrender for Service of Sentence.

Beam relayed the information he had learned from Dilberti to Defendant Schuster, a USMS deputy marshal in Kansas; and Schuster went to plaintiff's residence in Topeka. As he stood outside plaintiff's residence, Schuster made a cellular phone call to plaintiff's residential phone, but no one answered. Several times Schuster knocked on the door of the residence. No one responded. Schuster commenced surveilling the residence.

Some time later that day, plaintiff telephoned Beam, advising that plaintiff's wife had told him that the USMS had been at his home earlier that day. This of course indicated that plaintiff's wife had been home when Schuster had knocked and called the residence earlier that day. Beam told plaintiff that the USMS was there to take plaintiff into custody because he had failed to surrender to the BOP as appointed. Plaintiff responded that he was going to arrange his surrender through his attorney. Beam reiterated that plaintiff should immediately turn himself in, before new charges were filed against him. After telling Beam that he was at a gym, plaintiff advised that he would surrender.

But plaintiff was not at a gym, for shortly thereafter, while still surveilling the residence, Schuster made another cellular phone call to plaintiff's phone and plaintiff answered. Schuster identified himself, told plaintiff that he was outside, and instructed plaintiff to come to the door. Plaintiff did not comply, again stating that he would surrender later through his attorney; plaintiff then hung up the phone. Schuster again knocked loudly on plaintiff's door, instructing him to

come to the door. Schuster placed at least two more cellular phone calls to plaintiff's residence. No one answered the phone. After knocking again and receiving no response, Schuster advised Beam of the circumstances, then waited outside plaintiff's front door for other officers to arrive.

Beam and Defendant Weber, also a USMS deputy marshal, responded to the location. Having obtained approval from a USMS supervisor to make a forcible entry, Weber broke the back window of the residence and entered through the window, followed by Schuster. As they entered the home, plaintiff's wife vocally objected to their entry and questioned why they had damaged her window. Weber identified himself to her and repeatedly instructed her to open the door. Plaintiff's wife refused to open the door. Weber and Schuster handcuffed plaintiff's wife and had her sit on the couch. Schuster then opened the front door of the residence allowing other officers to enter the residence.

Plaintiff's wife repeatedly gave false information about plaintiff's location, first denying that he was home, then stating that he was in the bedroom. After hearing a crashing sound in the garage area, Schuster found plaintiff crouching beside a car in the attached garage. Schuster placed plaintiff under arrest and transported him to the Shawnee County jail pending his transfer to a BOP facility.

Discussion

A party suing the United States, its agencies or officers, must allege both a basis for the court's jurisdiction,² and a specific statute containing a waiver of the government's immunity from suit.³ On his form Complaint and in his response to defendants' motion to dismiss, plaintiff

²See Fed. R. Civ. P. 8(a)(1).

³*Thomas v. Pierce*, 662 F. Supp. 519, 523 (D. Kan. 1987) (citations omitted).

states that each defendant was acting in an official capacity as an employee of the United States at the time the alleged cause of action arose. An action against a federal actor in his official capacity is considered a suit against the United States because any judgment against the federal employee in his official capacity necessarily would be paid from the United States Treasury.⁴ Plaintiff's official capacity claims against all defendants as agents of the United States Marshals Service are, therefore, claims against the United States.

Under the doctrine of sovereign immunity, however, the United States is generally protected from lawsuits unless it waives immunity.⁵ The defense of sovereign immunity is jurisdictional in nature.⁶ Plaintiff has cited no authority containing the government's waiver of immunity in this case, and since there has been no waiver of sovereign immunity for constitutional tort actions under *Bivens*⁷ against the United States, any claim against the named defendants in their official capacity is barred.⁸ Likewise, sovereign immunity bars plaintiff's action for money damages against the United States Marshals Service based on the alleged unconstitutional acts of its officers.

And while the Federal Tort Claims Act (FTCA)⁹ provides for the recovery of money

⁴See *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); See also *Pleasant v. Lovell*, 876 F.2d 787, 793 (10th Cir. 1989).

⁵*Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1245-46 (10th Cir. 1989).

⁶*Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002).

⁷*Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (federal agent who "acting under color of his authority" conduct may be sued for damages).

⁸See *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002) (citing *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 483-86, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)).

⁹28 U.S.C. §§ 1346(b), 2674.

damages against the United States for cognizable state or common law torts committed by federal officials while acting within the scope of their employment, the FTCA requires plaintiffs seeking federal subject matter jurisdiction under the FTCA to exhaust all administrative remedies before bringing suit in federal court.¹⁰ Plaintiff has neither alleged nor shown that he has filed an administrative claim with the appropriate federal agency.¹¹ And the exhaustion of an administrative claim is a jurisdictional prerequisite to an FTCA action.¹² Because there is no indication in the record that plaintiff has exhausted his administrative remedies as required under the FTCA, the court lacks jurisdiction over plaintiff's claims. **IT IS THEREFORE**

ORDERED BY THE COURT that Defendants' Motion to Dismiss (Doc. 15) is **GRANTED**.

IT IS SO ORDERED.

Dated this 10th day of August 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Court

¹⁰*McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993) ("the FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies"); *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999).

¹¹28 U.S.C. § 2675(a).

¹²*Pipkin v. United States Postal Serv.*, 951 F.2d 272, 273 (10th Cir. 1991).